SERVED: November 19, 1993

NTSB Order No. EA-4019

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of November, 1993

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. ROGER W. SHERMAN, Respondent.	Docket SE-10549

OPINION AND ORDER

The respondent has appealed from an order issued by Chief Administrative Law Judge William E. Fowler, Jr., on December 11, 1991. By that order, the law judge granted the Administrator's motion to dismiss respondent's appeal as moot.[1] For the reasons that follow, we deny respondent's appeal.

[1]Copies of the orders pertinent to this decision are attached.

According to the record before us, on September 12, 1989, the Manager of the Federal Aviation Administration's (FAA) Civil Aviation Security Division issued a letter in which he informed respondent that he had engaged in conduct which was in violation of the Federal Aviation Regulations (FAR).[2] The letter further indicated that, "[a]fter reviewing the circumstances, it has been determined that the matter does not warrant legal enforcement action. In lieu of such action, we are issuing this letter which will be made a matter of record for a period of two years, after which, the record of this matter will be expunged." On September 21, 1989, respondent filed a notice of appeal with the Board for review of the letter of warning.

On November 29, 1989, the Administrator moved to dismiss respondent's appeal, asserting that the Board lacked jurisdiction to review a letter of warning because it was not an order of the Administrator amending, modifying, suspending, or revoking any certificate held by the respondent. The law judge denied that motion.[3] However, on December 11, 1991, the law judge issued an order granting the Administrator's subsequent motion to dismiss the proceeding as moot, since two years had passed since the issuance of the letter of warning and the matter had been expunged from respondent's airman records. It is from this order

[2]The letter alleged that respondent operated an aircraft in international airspace without proper aircraft registration forms.

[3]The Administrator's motion for consent to file an interlocutory appeal pursuant to 49 C.F.R. § 821.14(c) was also denied.

of the law judge that respondent appeals.[4]

Respondent argues that his appeal was not moot because expunction of the letter of warning from the FAA's files will not end the "many serious and consequential effects" he maintains were caused by the letter, which he contends represents a "violation" finding. (Appeal Brief at 6).[5] We find it unnecessary to decide what impact, if any, expunction of the letter of warning might have on any adverse consequences respondent believes it created, for, in our view, respondent's mootness argument begs a question we think the law judge decided incorrectly: namely, whether a letter of warning falls within the scope of the Board's review authority.

Section 609 of the Federal Aviation Act of 1958, 49 USC. § 1429(a)("Act"), empowers the Board to review only those orders of the Administrator that amend, modify, suspend, or revoke an airman certificate. While a letter of warning clearly neither suspends nor revokes an airman certificate, the law judge appears to have found that such a letter could, nevertheless, constitute an amendment or a modification of an airman certificate because

[4]The Administrator has filed a brief in reply.

[5]In this connection, respondent claims that he will be required to report what he terms this FAA "enforcement action" to his insurer, which may cause his premiums to go up; that he will be precluded from availing himself of the Aviation Safety Reporting System (ASRP) in the event he commits a violation in the future because of this violation history; and that his reputation as having a violation-free flight record will be adversely affected. The Administrator responds that respondent's claims are largely baseless, as there is no "finding of a violation" in a letter of warning to affect his insurance rates or his entitlement to immunity under the ASRP.

it represents a finding that the respondent had acted in a manner contrary to the regulations which he had not had the opportunity to litigate, and which, until expunged, could have some adverse effect. We disagree with this analysis.

As the Administrator points out in his reply brief, administrative actions, which include letters of warning and letters of correction, are wholly distinct from legal enforcement actions.[6] In Administrator v. Aero Lectrics, Inc., NTSB Order No. EA-3169 (1990), we found that letters of correction issued under FAR § 13.11 were not orders appealable to the Board because they do not purport to take any action with regard to a certificate. See also Administrator v. Palmquist, NTSB Order No. EA-2754 at 7, n. 9 (1988). Similarly, we perceive no valid basis for concluding that a letter of warning amends or modifies an airman's certificate. To be sure, such administrative actions set forth judgments concerning the validity of certain conduct under the FAR and suggest that failure to avoid certain conduct in the future may result in enforcement action.[7] However, the fact that an airman may, after receiving a letter of warning,

[6] Compare FAR § 13.11(a), where the Administrator provides that, if it is determined that a violation or an alleged violation of the Act does not require legal enforcement action, administrative action may be taken with FAR § 13.19, where the Administrator provides for certificate actions under section 609 of the Act.

[7] In FAA Order 2150.3A, attached to one of the Administrator's pleadings, it is noted that administrative action does not charge a person with a violation, and it is intended only to bring the incident to the attention of the person involved, document corrective action, and encourage future compliance with the regulations.

feel constrained to exercise his certificate rights differently, or may strenuously object to a characterization of past conduct as contrary to law, does not mean that every disputed view of the Administrator respecting an airman's compliance with regulatory standards amounts to certificate modification or amendment subject to our review.[8]

Because we conclude that the Board lacks jurisdiction to review a letter of warning, we will deny the appeal from the law judge's order.[9]

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The proceeding is terminated.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

[8]We intimate no view as to what rights an airman may have in some other forum to challenge legal opinions of the Administrator concerning his conduct that arguably present immediate or potential adverse collateral consequences that do not alter in any direct way the certificate authority he holds.

[9]Barlow v. FAA, No. 86-1807 (10th Cir. December 23, 1986), does not support the law judge's ruling. As we noted in Administrator v. Schart, NTSB Order No. EA-3718 at 3 (1992), Barlow does not stand for the proposition that the Board has jurisdiction to review FAA administrative actions.